that the creditor must go to England to recover it, is shabby and oppressive. More especially is that so in view of the fact that the defendants hold the entire and exclusive security over the Gregory company's property, and that the creditor was only induced to advance the money to the Gregory company by the guarantee created by the defendants' endorsement. It is within the law, and that is all that can be said for it.

Appeal dismissed with costs.

Solicitors for the appellants, *Saywell & Saywell.*
Solicitor for the respondents, *A. G. de L. Arnold.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . APPELLANT;

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Stamp Duty—Settlement—Trust to take effect after death of settlor—Trust for wife during joint lives of settlor and for survivor for life—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 49, 58.

Sec. 49 of the *Stamp Duties Act* 1898 (N.S.W.) enacts, first, that duties according to the Third Schedule to the Act shall be levied upon and in respect of all estate whether real or personal which belonged to any person dying

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

after the commencement of the Act, and then enacts that duties at the same rates shall be levied upon (*inter alia*) "all estate, whether real or personal, (*a*) which any person, dying after 22nd May 1894, has disposed of, whether before or after that date, by will or by settlement containing any trust in respect of that estate to take effect after his death, under any authority enabling that person to dispose of the same by will or deed, as the case may be." Sec. 58 enacts that within six months after the death of any person who has executed a settlement "containing any trust to take effect after his death" notice of the settlement shall be lodged with the Commissioner of Stamp Duties together with a declaration specifying "the property thereby settled and the value thereof," and that duty shall thereupon be payable on such value at the rates specified in the Third Schedule.

By a marriage settlement executed by a settlor who died in 1912 he transferred certain shares and debentures, his property, to trustees upon trust after the marriage and during the joint lives of the settlor and his intended wife to pay the income to her without power of anticipation, and after the death of such one of them who should first die to pay the income to the survivor for his or her life, but without power to the wife "to dispose of or charge such reversionary life interest by anticipation" during the intended coverture, and after the death of the survivor upon trust for the issue of the marriage and in default of issue upon trust for the settlor, his executors, administrators and assigns. The wife survived the settlor, and there was no issue of the marriage.

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Powers* J. dissenting), that the trust in favour of the settlor's wife after his death was a trust to take effect after the death of the settlor within the meaning of secs. 49 and 58 of the *Stamp Duties Act* 1898, and was taxable accordingly.

Decision of the Supreme Court of New South Wales: *Ex parte Commissioner for Stamps*; *In re H. W. Fairfax's Settlement*, 14 S.R. (N.S.W.), 294, reversed.

APPEAL from the Supreme Court of New South Wales.

On 4th September 1900 an indenture of settlement was executed between the settlor, Harold Walter Fairfax, of the first part, his intended wife, Elsie Dora Cape, of the second part, and the trustees, the Perpetual Trustee Co. Ltd., of the third part, whereby, after reciting the intended marriage and that the settlor was absolutely entitled to certain shares and debentures which it was intended should forthwith be transferred to the trustees, it was agreed and declared that the trustees should, after the marriage, stand possessed of the shares and debentures and the investments representing them and "shall, during the joint lives of the said Harold Walter Fairfax

and Elsie Dora Cape, pay the income of the said shares and debentures, and of all other the investments for the time being representing the said trust premises, to the said Elsie Dora Cape, but so that she shall not have power to anticipate the same; and after the death of such one of them, the said Walter Harold Fairfax and Elsie Dora Cape, as shall first die shall pay the income of the said trust premises to the survivor of them and his or her assigns during his or her life, but so that the said Elsie Dora Cape shall not, during her said intended coverture, have power to dispose of or charge such reversionary life interest by anticipation; and after the death of the survivor of them, the said Harold Walter Fairfax and Elsie Dora Cape, shall stand possessed of all the trust premises and the income thereof in trust for all or any the children or remoter issue of the said intended marriage in such shares and manner in all respects as the said Harold Walter Fairfax and Elsie Dora Cape shall by any deed or deeds revocable or irrevocable jointly appoint; and in default of and subject to any such appointment, then as the survivor of them the said Harold Walter Fairfax and Elsie Dora Cape shall in like manner or by will or codicil appoint, and in default of and subject to any such appointment under the respective powers hereinbefore contained, in trust for all or any the children or child of the said intended marriage, who, being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, and if more than one in equal shares. And it is hereby agreed that if there shall be no child of the said intended marriage who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then subject to the trusts and powers hereinbefore declared and contained, or by law vested in the trustees, the trustees shall stand possessed of the said trust premises and the income thereof in trust for the said Harold Walter Fairfax, his executors, administrators and assigns."

The marriage was solemnized, and on 15th January 1912 the settlor died leaving him surviving his wife and having made a will by which he appointed the Perpetual Trustee Co. Ltd. his executors. There was no issue of the marriage.

The Commissioner of Stamp Duties claimed duty on the value of

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

the property the subject of the settlement under sec. 58 of the *Stamp Duties Act* 1898, and he called upon the trustees of the settlement to furnish a declaration of the property settled and the value thereof. Upon their refusal to do so, the Commissioner obtained a rule *nisi* calling upon the trustees to show cause why an order should not be made that a sufficient part of the property included in the settlement be sold and the proceeds applied in payment of stamp duty in accordance with sec. 58.

The Full Court having discharged the rule *nisi* (*Ex parte Commissioner for Stamps*; *In re H. W. Fairfax's Settlement* (1)), the Commissioner now, by special leave, appealed to the High Court.

The appeal was first argued before *Griffith* C.J. and *Isaacs* and *Gavan Duffy* JJ. on 9th and 12th April, and was directed to be re-argued.

Rolin K.C. (with him *S. A. Thompson*), for the appellant. The trust for the settlor's wife for life after the death of the settlor is a trust to take effect after the death of the settlor within the meaning of sec. 58 of the *Stamp Duties Act* 1898. Although in the result the wife gets a life estate it is by virtue of two separate trusts, one of which terminated on the death of the settlor and the other of which did not take effect until after his death. An estate for joint lives comes to an end on the termination of one of the lives: *Mara* v. *Browne* (2). If the gift had been of real estate, the wife's estate after her husband's death would not be a life estate but a contingent interest: *Whitby* v. *Von Luedecke* (3). Although the substance of the transaction is to be looked at, the substance depends on the language used: *Vin. Abr.*, tit. "Merger" (F).

E. M. Mitchell, for the respondents. The question is what is the substance apart from the form in which it is shaped: *Attorney-General* v. *Power* (4); *Lang* v. *Webb* (5).

[ISAACS J. referred to *Earl Grey* v. *Attorney-General* (6).]

The ordinary form of doing that which was done here would be to give the wife a life estate subject to restraint upon anticipation.

(1) 14 S.R., 294.
(2) (1895) 2 Ch., 69.
(3) (1906) 1 Ch., 783.
(4) (1906) 2 I.R., 272.
(5) 13 C.L.R., 503, at p. 514.
(6) (1900) A.C., 124.

[Counsel referred to *In re Cochrane* (1); *Attorney-General* v. *Beech* (2).] Technically a life estate is given to the wife, and, if not, then what in terms is given to her should be added together so as to find out what in substance is given to her. [Counsel referred to *Wale* v. *Commissioners of Inland Revenue* (3); *In re Dunsany's Settlement*; *Nott* v. *Dunsany* (4).] The doctrine of merger applies. If there is a limitation to A for the lives of A and B and then a remainder to A for life, the gift to A for the lives of A and B is a lesser estate than that to A for life, and the lesser estate merges in the greater: *Vin. Abr.*, tit. "Merger" (F) (4) and (5). [Counsel also referred to *Goodeve's Real Property*, 2nd ed., p. 155; *Mara* v. *Browne* (5).]

Cur. adv. vult.

Dec. 14.

The following judgments were read:—

GRIFFITH C.J. This case affords an excellent illustration of the maxim *Qui hæret in literâ hæret in cortice.* The respondents are the trustees of a marriage settlement dated 4th September 1900, made upon the marriage of Harold Walter Fairfax and Elsie Dora Cape, by which the intended husband transferred certain shares and debentures, his property, to them as trustees upon trust during the joint lives of the husband and wife to pay the income to the wife without power of anticipation, and after the death of such one of them as should first die to pay the income to the survivor for his or her life, but without power to the wife "to dispose of or charge such reversionary life interest by anticipation" during the intended coverture, and after the death of the survivor upon trust for the issue of the marriage, and in default of issue (which happened) upon trust for the settlor, his executors, administrators and assigns.

The husband died on 15th January 1912.

The *Stamp Duties Act* 1898 is divided into four Parts. Part I. is Preliminary; Part II. relates to Duties on deeds or instruments *inter vivos*, which are stamp duties properly so called; Part III. is headed "Duties on estates of deceased persons." Sec. 49 enacts,

(1) (1906) 2 I.R., 200. at p. 204.
(2) (1899) A.C., 53.
(3) 4 Ex. D., 270.
(4) (1906) 1 Ch., 578.
(5) (1896) 1 Ch., 199.

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Griffith C.J.

first, that duties according to the Third Schedule to the Act shall be levied upon and in respect of all estate whether real or personal which belonged to any person dying after the commencement of the Act. It then goes on to enact that duties at the same rates shall be levied upon (*inter alia*) all estate real and personal which any person dying after 22nd May 1894 had disposed of before or after that date "by will or by settlement containing any trust in respect of that estate to take effect after his death under any authority enabling" him "to dispose of the same by will or deed." Sec. 58 provides that within six months after the death of any person who has executed a settlement "containing any trust to take effect after his death notice of the settlement shall be lodged" with the Commissioner of Stamps with a declaration specifying "the property settled and the value thereof," and that duty shall thereupon be payable on such value at the rate specified in the Third Schedule.

The appellant contends that the settlement in question created a trust to take effect after the death of the settlor, namely, a trust to pay the income of the settled property to his widow for life.

The Act by which the duty is imposed is called a Stamp Act, but the duty in question is not a stamp duty. It is what is generally called a Succession Duty or Estate Duty. The particular nomenclature is unimportant. The substance is that it is a duty payable in respect of property as to which a trust takes effect after the death of the settlor, by which I understand a trust which first comes into effect as to that property after and not before his death, so as then to confer a present right of enjoyment upon some person not before entitled to the property. The event is commonly spoken of as property "passing" on the death of the settlor, which is the phrase generally used in the English Acts dealing with the same subject, *e.g.*, the *Finance Act* 1894.

The Commissioner contends that the wife took two distinct and separate interests, namely, an interest during the joint lives of the spouses, *i.e.*, an interest for the life of her husband if she should so long live, and another and distinct interest accruing upon his death. It is clear that precisely the same effect would have been produced if the trust had been specified in the more usual form, namely,

to the wife for life with remainder to the husband for life, in which case no question could have arisen.

It is a settled rule that in the determination of liability to taxation under a taxing Act the Court has regard to the substance rather than the form of the transaction sought to be taxed, that is to say, in the case of an instrument, that the Court is not bound by its apparent tenor and will decide according to the real nature of the transaction. (See, for instance, *Christie* v. *Commissioners of Inland Revenue* (1); *Wale* v. *Commissioners of Inland Revenue* (2); *Attorney-General* v. *Power* (3).) In the present case, accordingly, the question is whether the settlement is in substance and in its legal operation, so far as regards the wife's life interest, a settlement of property to come into operation, as distinguished from continuing in effect, after the death of the settlor.

There was no moment after the solemnization of the marriage at which the wife was not entitled to the income for her whole life and could not, but for the restraint on anticipation, have disposed of it.

Under these circumstances I am of opinion that the settlement in substance created a single trust for the wife for her whole life beginning at the marriage, and that the Court must, if it follows the recognized rules of construction, construe it accordingly, and not as creating two separate trusts dividing the life interest into two parts. If a man settled the income of property upon his son until he should attain the age of 21 and thereafter upon him for life, it could not be seriously contended that the son did not take a single estate for life in the income commencing at the date of the settlement. I cannot see any distinction between such a case and the present.

This conclusion is supported by high authority. In the case of *Attorney-General* v. *Beech* (4) a mother had, under power in a settlement, appointed property to her son subject to her own life estate, and afterwards conveyed that life estate to him. The House of Lords held that he had the whole estate before her death, and that therefore nothing passed to him upon it. In that case there were two instruments, in this case there is only one.

(1) L.R. 2 Ex., 46.
(2) 4 Ex. D., 270.
(3) (1906) 2 I.R., 272.
(4) (1899) A.C., 53.

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Griffith C.J.

The argument which was addressed to the Court in that case was substantially the same as that addressed to us for the appellant in this case, and was accepted by the Divisional Court, but the House of Lords did not call upon the opposite party.

The Earl of *Halsbury* L.C. said (1):—"When the mother had passed her life estate by a conveyance *inter vivos* to her son, would anybody in the world, untainted by technical views, have said that that estate passed from the mother to the son upon death? Death had nothing to do with it. The moment that conveyance was made the son was completely master of the situation, and he might have sold the property the very next day. Then in what sense has it passed on the death?"

So I ask here:—"Would anybody in the world untainted by technical views have said that that interest passed to Mrs. Fairfax upon the death of her husband?"

Lord *Watson* said (2):—"Now, with regard to the property in question here, it is a right of life-rent which was not in the deceased at the time of her death; she had parted with it months before, and accordingly, having so parted with it by a deed *inter vivos*, it follows that . . . no benefit accrued or arose by the cesser of her interest. Now it is said that the succession, the fee which was taken by the respondent, was taken by him under the settlement. That is true; but it was not taken by him in such circumstances as to render it a succession or interest which was liable to taxation under the Act with which we have to deal."

Lord *Davey* said (3):—"It is a complete fallacy, in my opinion, to say that Mr. Beech, the respondent in the present case, was, after he took a surrender of his mother's life interest, the owner of two separate interests. He was the absolute owner of the property, and one cannot be more than the absolute owner of the property. There is no single test of ownership that can be applied to his position at that date which shows that he was in any degree other than the absolute owner of the property. If he was the absolute owner of the property before Mrs. Beech's death, he remained absolute owner of the property afterwards, and there was no passing

(1) (1899) A.C., at p. 57. (2) (1899) A.C., at p. 59.
(3) (1899) A.C., at pp. 60, 61.

of the estate—that is, no change of ownership by reason of Mrs. Beech's death. My Lords, this is not a mere technical doctrine—it is the expression of a fact. A man, it may be, had a conveyance from half-a-dozen persons, but from whomsoever he derives his title, however many be the persons who join in conveying to him, if he has got the absolute ownership he is the owner of one estate or interest, namely, the ownership in fee of real estate, or absolute owner of personal estate."

So far I have dealt with the case upon the recognized principles for the construction of taxing Acts and instruments sought to be made taxable, which I may venture to call the principles of common sense. I will now deal with it according to the rule asserted by the appellant, which is that where a continuous interest in property is given to a person in language which formally and notionally divides it into two parts, one immediately following the other, the interest is to be regarded as two separate gifts and not as a single gift. I venture to affirm that there is no such rule of construction known to the law. If the document to be construed were a will or will and codicil, no one would contest the position. The duty of the Court to ascertain the intention of the parties is the same whatever the document may be.

If an estate in land had been given to Mrs. Fairfax with similar limitations by a common law conveyance there is no doubt that she would have taken a single estate for her own life. For a gift to A for the joint lives of A and B is a gift to A for the life of B terminable at A's death. An estate for life is regarded as greater than an estate *pur autre vie*. If, therefore, such a gift were followed by a gift in remainder to A for his own life his estate for the life of B would be merged in it, and A would take a single estate for his own life. In equity the question of merger does not depend upon the union of two estates in the same person, but upon the intention of the parties concerned, in this case the intention to create a single interest or two interests divided metaphysically.

To my mind, with all respect for those who take a contrary opinion, the contention that the parties intended that Mrs. Fairfax should not take a single and uninterrupted right to the income of the trust property from the date of the marriage until her death is

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Griffith C.J.

not seriously arguable. An identical benefit—in this case the right to receive the income of the trust property in any event during the whole of the beneficiary's life—may be conferred by either of two forms of words. The argument is that if one form is adopted the transaction is taxable, if the other, it is not, because, forsooth, the adoption of one form of words indicates a different intention, for which no motive except to benefit the revenue can be suggested, from that which would be shown by adopting the other. The intention in either case is to confer the same benefit. It follows that the intended benefit may be at one and the same time both identical and different. My intellect, at any rate, is too obtuse to understand, with Mr. Gladstone's "safe man," how two contradictory propositions may sometimes both be true.

For these reasons, which are not quite the same as those which found favour with the Supreme Court, I think that their decision was correct. I should add a word as to their view that, as the trust for the survivor for life would, if the husband had survived, have come into operation in his favour, and was therefore capable of taking effect before his death, the trust could not be regarded as one to take effect after his death. In the passage quoted from my judgment in the case of *Rosenthal* v. *Rosenthal* (1) I certainly had no such case in contemplation. What I said was, I think, consistent with the view that such a trust is severable, and that the provisions of the Act then under consideration (which are in substance not distinguishable from the Act now in question) should be construed as including a trust which, in events which might happen before the death of the settlor, would not take effect by way of transmutation of enjoyment until after it.

In my judgment the appeal should be dismissed.

ISAACS J. Harold Walter Fairfax made a marriage settlement dated 4th September 1900 in which he declared that after the death of such of two persons—himself and Elsie Dora Cape, his intended wife—as should first die, the trustees of the settlement should pay the income of the trust premises to the survivor, and his or her assigns during his or her life. The settlor died in January 1912,

(1) 11 C.L.R., 87.

leaving his widow surviving. The simple question is whether the settlement contains a trust to take effect after the settlor's death. With very great respect, it seems to me what Lord *Halsbury* in one case described as "burning daylight" to demonstrate that the settlement is of that description. But in view of the fact that the Supreme Court thought otherwise and that two of my learned brothers come to the same conclusion though for entirely different reasons, I proceed to state in detail the grounds for my opinion.

Primâ facie every one admits, and must admit, that a trust to pay income to A for life after the death of the settlor is a trust to take effect after the settlor's death. This is exactly what the particular trust says, and yet it is maintained it is not a trust of that description. The words of Lord *Robertson* in the *Lord Advocate* v. *Stewart* (1) are much in point. He said:—"The principle that in Statutes words are to be taken in their legal sense has, as Lord *Stormonth-Darling* points out, a special cogency when the words in question represent only legal conceptions. The popular use of such words does not represent the primary meaning of the words, but some half understanding of them." I say this because Mr. *Mitchell* rested much of his argument on what he termed the popular understanding of such a trust.

Now, the learned Judges in the Supreme Court accepted my view in *Rosenthal's Case* (2), where I said:—"So long as the gift is so made that it is legally impossible of enjoyment until the settlor's death, it sufficiently approaches the analogy of a testamentary disposition to satisfy both the words and the manifest object of the legislation." If this is applied to the gift to Elsie Dora Cape, which is the only one we have to consider, it cannot assist the respondents. But their Honors rested their ultimate opinion entirely on the word "survivor." They reasoned that as the trust was for the "survivor" the trust "took effect" immediately—that is, on the solemnization of marriage—and did not wait for the settlor's death. But, except that the trust for Elsie Dora Cape was there and then fully constituted, the trust for her did not then take effect at all. The time had not arrived when it could "take effect," because the contingency of her surviving the settlor had not happened. A trust

(1) (1902) A.C., 344, at p. 356. (2) 11 C.L.R., 87, at p. 96.

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Isaacs J.

does not necessarily " take effect " upon its creation. If it did, the doctrine of perpetuities could very easily be satisfied. A contingent remainder or a contingent use does not " take effect " until the event happens upon which the contingency rests. The phrase " take effect " has a very definite signification, and is of everyday use. See, for instance, per Lord *Selborne* in *Pearks* v. *Moseley* (1), and the observations of *Kekewich* J. in *In re Finch and Chew's Contract* (2), and the *Encyclopædia of the Laws of England,* 2nd ed., " Contingent Use," vol. III., p. 524.

The word " survivor " is only a compendious way of writing the names of the settlor and his intended wife in the alternative and leaving the event to determine in whose favour the trust is to take effect. The view taken in the Supreme Court was not pressed before us, and finds no favour with any member of this Court. The variance of our opinions rests upon an entirely different point. The view urged before us was this. There is first a trust to pay Elsie the income during the joint lives of Harold and herself, and then there is the trust referred to to pay her the income for her life after his death. Inasmuch as it was certain that by the joint operation of these two trusts she would receive the income as long as she lived, it is urged that she had from the first a simple life estate, or rather life interest in the trust property, and, consequently, that there never was anything to take effect after the settlor's death.

I must confess, with much deference, that I cannot follow the reasoning. First, there was the trust giving her the interest during the joint lives. Now, was that a trust for joint lives or not ? If there is not a trust to take effect after death, then there is no trust for joint lives either. After the joint life interest, the trust is for the settlor if he survives and for Elsie if she survives. If the settlor had survived, there would plainly have been a joint life trust for her up to her death, and nothing but such trust. And if an Act had said that duty should be paid where such a trust existed, payment could not, so far as I see, have been contested for an instant. The subsequent trust for her in the event of her surviving would not in that case take effect, or obliterate the trust for joint lives. But, because in the events that have happened, she has been able to enjoy both trusts, therefore

(1) 5 App. Cas., 714, at p. 721. (2) (1903) 2 Ch., 486.

it is said she has had neither. A sort of chemical change has, it is argued, occurred, by which the two distinct and separate trusts, differently phrased, deliberately and intentionally separated, and therefore in equity not the subject of merger even if the second were not contingent, have vanished and become a *tertium quid*. It is contended that both trusts disappear, and instead of them a life interest pure and simple of the same quality and character throughout has existed from the very first. By what operation, no one has been able to say. It is not like the self-executing operation of merging legal interests in property as in *Attorney-General* v. *Beech* (1). Coalescence was suggested, but contingency, and the clear intention to keep the trusts separate, prevent that. The main argument was that popularly speaking one would say Elsie had a life estate. That I have answered.

If, instead of asking whether Elsie had in effect a life estate, the question were put whether she during the joint lives had an estate or interest for her husband's life, the answer would have been No ; that her enjoyment of the income was not necessarily for the whole of his life—it depended on whether he predeceased her or not. She had, then, not an estate *pur autre vie*, any more than an estate for her own life, a result which at one time might in the case of legal estates in land have had practical effect.

Let us consider, however, on principle, how it can be said that Elsie had a life estate in her husband's lifetime, and the same life estate afterwards. Two kinds of life estate are well known—an estate for one's own life and an estate for the life of another. The first is in law the higher estate.

But as *Coke upon Littleton* (41b) says :—" You have perceived, that our author divides tenant for life into two branches, viz. into tenant for terme of his own life, and into tenant for terme of another man's life : to this may be added a third, viz. into an estate both for terme of his own life, and for terme of another man's life. As if a lease may be made to A to have to him for terme of his owne life, and the lives of B and C, for the lessee in this case hath but one freehold, which hath this limitation, during his owne life, and during the lives of two others. And herein is a diversity to be observed betweene

(1) (1899) A.C., 53.

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Isaacs J.

several estates in several degrees, and one estate with several limitations. For in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not."

Now apply that to the present case. During her husband's life Elsie had a freehold—using that term figuratively as applied to this property—with the double limitation. Until the contingency of her surviving occurred, a contingency which was interposed between that trust and the next in her favour, the double limitation remained the only possible limitation. Her life estate during that period was not higher than the estate for her husband's life, and her absolute interest extended no further than his life no matter how long she lived. If she died first, she could never have any higher estate. Only when her husband died first did she have a freehold with the single limitation of her own life, which was then a freehold of higher nature than the life of another. But she took this higher estate by virtue of the later disposition, operating after her husband's death and which then and only then " took effect," and henceforth, and only henceforth, had she a simple life estate no matter how short a time she lived. But for that trust she never could have had that second interest, and yet it is said that trust never existed, and still she had the interest. The cases upon the doctrine of general tenor and effect of deeds, so as to identify them truly for tax purposes, have no application. Where the Legislature says an instrument of transfer is to be taxed at one rate, and an agreement at another, and a mortgage at a third, no doubt the Court looks at the substance of the operation effected by the deed in order to classify it truly. And if it is contested whether a trust is created, then the Court will, of course, read the words and decide whether a trust has been in contemplation of law created, and what it is. But, once conclude that there is a trust and once ascertain its terms, then that fact cannot be ignored, because in conjunction with another trust, equally an existing fact, the practical effect in view of the events that have happened or that must happen is reached that could have been reached without it. See *Earl Grey's Case* (1). When the only criterion of a taxing Statute is whether a deed contains a covenant or a trust, or a receipt

1) (1900) A.C., 124.

if in it you find a covenant, or a trust or a receipt—as those words are legally understood—the description is satisfied, and the Court cannot go beyond the Statute. That in my view is the present case, and the law with respect to fiscal Statutes applies as laid down by *Parke* B. in *In re Micklethwait* (1), and quoted by Lord *Halsbury* in *Tennant* v. *Smith* (2), and as also stated by Lord *Cairns* in *Partington* v. *Attorney-General* (3).

In my opinion the appeal should be allowed.

GAVAN DUFFY J. In this case the trust to pay income to the wife for her life should she survive her husband was directed to take effect after his death, and so comes within the exact words of sec. 58 of the *Stamp Duties Act* 1898. But it is said for the respondents that when the settlement is looked at as a whole it will be found that the effect of this trust coupled with the preceding trust to pay her the income during the joint lives of her husband and herself is that in any event she must receive that income from the solemnization of the marriage till her death, and that therefore the trust to pay her the income for life was "to take effect," not after the date of her husband's death, but from the date of the marriage. It is true that the effect of the settlement was to give her the income from the date of the marriage till her death, but that result was attained not by a trust "to take effect" from the date of the marriage, but by two trusts, one of which was "to take effect" from the date of the marriage, and the other after the death of her husband should that event put an end to the first trust, but not otherwise. It seems to me impossible to say that the settlement does not contain this latter trust, and contain it as essential to the expression of the settlor's wishes. Without it the wife would have had no life interest, but at best an interest which would in fact last as long as her life in case she died before her husband but not otherwise. The authority of the *Attorney-General* v. *Beech* (4) was cited in favour of the respondents, but in my opinion it does not assist them. It is to be observed that the question there was whether the property "passed" on the death of the tenant for life, while here the question is not when

(1) 11 Ex., 452, at p. 456.
(2) (1892) A.C., 150, at p. 154.
(3) L.R. 4 H.L., 100, at p. 122.
(4) (1899) A.C., 53.

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Gavan Duffy J.

any property "passed" but whether the settlement when made contained a trust "to take effect" after the death of the settlor; but assuming for a moment that the question here is "at what time did the life interest under this settlement pass to the wife" *Beech's Case* would directly support the view that it passed under the second trust, which creates the life interest. It was there held that the question of when the property passed must be determined by ascertaining the instrument under which it in fact passed, and that where a beneficiary to whom an equitable remainder would have passed on the death of the equitable tenant for life, took a surrender of the life interest, the property passed under and at the date of the surrender, and not on the death of the tenant for life.

Counsel somewhat reluctantly invoked the assistance of the doctrine of merger; but there can be no merger of a certain interest in one that is uncertain, of that which is analogous to a vested particular estate at law in that which is analogous to a contingent remainder. If there could be such a merger it would take effect only if the settlor so intended, and how could we attribute to the settlor the intention of merging the equitable interest for the joint lives of husband and wife in the equitable life interest contingent on the death of the husband during her life so that under the settlement she would get nothing unless and until her husband predeceased her?

POWERS J. The claim of the Commissioner for the stamp duty in question in this case is based on words in the settlement which have been fully referred to by my learned brothers, and, if the form of the deed only had to be considered, I would find a difficulty in disallowing the appeal. The claim for duty, however, is made under sec. 58 of the New South Wales *Stamp Duties Act* 1898 (No. 27 of 1898).

Sec. 58 is in Part III. of the Act, dealing only with duties on estates of deceased persons. The duty, if payable at all, is only payable under the Third Schedule to the Act—also headed "Duties on estates of deceased persons." The learned Judges of the State Supreme Court uanimously held that duty was not payable. The appeal to this Court is from that judgment.

Sec. 58 and the material clauses in the settlement have already been quoted by my learned brothers. If, as I have said, the form of the deed settles the question, a different question arises, but if the substance of the transaction—that is, the transaction effected by the settlement—is to be the deciding factor, the duty, in my opinion, is not payable.

The settlement, read in any reasonable way, shows that the transaction was one under which the then intended wife was to get the income for her life, from the date of the marriage, whether the settlor died during her lifetime or not; his death was not in any event to determine her life interest. The settlement gave the wife a life interest in any event, subject only to the condition that while the husband lived she should not anticipate. The fact that *in form* the settlement gave *the wife* this life interest in the income (1) for the joint lives of the wife and husband, and (2) continued it after the death of the husband, instead of directly giving her the life interest in one clause, and then giving the life interest in the income after her death to the husband if he survived her, does not alter the substance of the transaction. No one can say that the settlement did not, from the date of the marriage, give her a life interest which was not, and could not be, determined by the death of her husband. If, therefore, the form does not decide the question where the claim is for stamp duty, I do not see how the duty can be claimed under Part III. of the *Stamp Act*.

I agree with the Chief Justice that "it is a settled rule that in the determination of liability to taxation under a taxing Act the Court has regard to the substance rather than the form of the transaction sought to be taxed, that is to say, in the case of an instrument, that the Court is not bound by its apparent tenor and will decide according to the real nature of the transaction"; and that, "in the present case, accordingly, the question is whether the settlement is in substance and in its legal operation, so far as regards the wife's life interest, a settlement of property to come into operation, as distinguished from continuing in effect, after the death of the settlor."

I propose to refer to one case, namely, *Wale* v. *Commissioners of*

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Powers J.

Inland Revenue (1), and I refer to that case chiefly because in it the law is so clearly laid down by the learned Judges that the substance —not the form—is to be considered. That was the law then, and is the law to-day. In that case the Court held that although a mortgage had been executed for £470 it was only liable to duty as a transfer of mortgage as to £350, and as a mortgage only as to £120. The form was admittedly a mortgage; the transaction was held to be, in substance, a transfer of mortgage as to £350, and only liable to duty as a transfer of mortgage to that extent, and as a mortgage to the extent of £120 only. *Kelly* C.B. said (2):—"The particular mode and form in which the change or transfer was carried out, do not affect the question. In substance the effect of the whole transaction was a transfer of the mortgage from Mrs. Ingram and her trustee to Sutton . . . We are considering what tax should be imposed upon the subject, and when we look at sec. 109 of the *Stamp Act* 1870 it is clear that the object of the Legislature was not to multiply taxation, but, although the securities might be varied and additional security given, to look to the substance of the transaction."

In this case I think it is also clear that the Legislature only intended, under Part III. of the *Stamp Act*, to claim duty on estates of deceased persons, namely, on estates or interests which only took effect, and vested in some person, on the death of the settlor, and not to estates or interests that were vested by a settlement for the life of the wife whether her husband predeceased her or not.

Pollock B., in the same case, said (3):—"But, said the Solicitor-General, by this Schedule the duty payable is to depend upon 'the amount transferred,' and he said here there is no amount transferred, because the whole £470 is borrowed on the security of a new mortgage of the whole estate, the mortgage being for the whole undivided sum of £470. But let us look at the substance of the thing. It is true that the first mortgagee is paid off, and that there is not an actual transfer of the debt of £350, but practically so far as the mortgagor is concerned, and looking at the ordinary use of language by conveyancers, one would say the mortgagee held, not

(1) 4 Ex. D., 270.

(2) 4 Ex. D., at p. 277.

(3) 4 Ex. D., at p. 278.

an entirely new mortgage, but a transfer of the old mortgage for £350."

Other questions raised in the case have been fully dealt with by the Chief Justice.

I agree that the appeal should be dismissed.

RICH J. Sec. 58 of the *Stamp Duties Act* 1898 and the material parts of the settlement have already been referred to.

The first limitation in the settlement is a gift to the wife of an interest *pur autre vie*. This is followed by a distinct gift to her for her own life in the event of her surviving her husband.

The first gift comes to an end on the husband's death. The second gift takes effect only after his death, as the question whether the wife does or does not in fact take this interest depends on whether she does or does not survive her husband. In these circumstances the interest taken by the wife under the second limitation comes within the very words of sec. 58.

With regard to the question of merger it is difficult to see how the two interests can be said to merge. Apparently, the contention is that the vested interest *pur autre vie* merged in the interest for the widow's own life, the latter being regarded as the larger interest: *Preston on Conveyancing*, vol. III., p. 225; *Lemon* v. *Mark* (1); but the latter interest is in strictness a mere chance of an interest, and I cannot understand how the actual and certain interest can be said to merge in the mere contingent chance.

But the arguments against merger seem to rest on even more solid ground. The *Forfeiture of Leases Act of* 1901, sec. 3, provides that there shall not, after the commencement of that Act, "be held or deemed to be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." The question of merger must, therefore, be decided according to the doctrines of equity, and the principle by which the Court of Equity is guided is the intention: *Capital and Counties Bank* v. *Rhodes* (2); *Thorne* v. *Cann* (3); *Whiteley* v. *Delaney* (4).

(1) (1899) 1 I.R., 416, at pp. 435, 445.
(2) (1903) 1 Ch., 631, at pp. 652, 653.
(3) (1895) A.C., 11.
(4) (1914) A.C., 132.

H. C. OF A. 1915.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Rich J.

An obvious object of the settlement was to give the wife an immediate income, but this object would be defeated by the drowning of the interest *pur autre vie* in the contingent interest which was only to take effect after the death of her husband. Such a merger would mean that the interest *pur autre vie* arises and is destroyed in one and the same instant: *Cf. Fearne*, 10th ed., pp. 343, 345, 346; *Snow* v. *Boycott* (1).

Such a result seems to be opposed to the ordinary rules of construction.

Under the settlement the conversion of the investments forming the trust property could, during their joint lives, only be effected with the consent of both spouses. This power given to the wife immediately upon marriage affords direct evidence of intention, and is only consistent with the construction that the wife took an immediate beneficial interest upon marriage.

For these reasons I am of opinion that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Rule absolute with costs. Respondents to pay costs of appeal.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *Cape, Kent & Gaden.*

B. L.

(1) (1892) 3 Ch., 110, at p. 115.